

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CACR06-908

MAY 2, 2007

ALESHA HARRISON	APPELLANT	APPEAL FROM THE CLARK COUNTY CIRCUIT COURT [NO. CR05-67]
V.		HON. JOHN A. THOMAS, JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

Appellant Alesha Harrison entered a conditional plea of guilty to possession of crack cocaine with intent to deliver. She appeals, arguing that the trial court erred in denying her motion to suppress the search warrant issued for the search of her home.¹ We affirm.

The search warrant in this case was issued on April 7, 2005, on the basis of an affidavit dated the same day executed by Agent Brent Whitworth of the Group-6 Narcotics Enforcement Unit, alleging in relevant part as follows:

FACTS CONSTITUTING PROBABLE CAUSE

1. Affiant states that on or about April 6, 2005, a reliable confidential informant contacted this Affiant and several suspected drug dealers were identified. Alesha Harrison was named as being a crack cocaine dealer.

¹Appellant has filed this appeal pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, which allows a defendant to enter a conditional plea of guilty “reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress seized evidence”

- The informant stated that Alesha Harrison lived at 12th and Pecan Street in Arkadelphia and that she sells crack cocaine from her residence.
2. That this Affiant requested that the informant attempt a controlled buy of crack cocaine from Alesha Harrison from her residence. The informant agreed and was searched for drugs, paraphernalia and/or money with negative results. This Affiant then provided the informant with forty dollars (\$40) in police buy money and instructed the informant to go directly to the residence, attempt the buy, and return immediately to this Affiant.
 3. This Affiant observed as the informant went directly to Alesha Harrison's residence, went to the east side of the residence (which appears to be the main point of entry), stayed for several minutes, and returned immediately to this Affiant.
 4. Upon the informant's return, the informant gave this Affiant an off-white, rock-like substance, which weighed approximately .4 grams, and appeared by sight and texture to be crack cocaine. The informant stated that the drugs were purchased from Alesha Harrison.
 5. Affiant states that the informant mentioned herein identified several suspected and known drug dealers and/or users and has successfully completed controlled buys on two occasions.
 6. Affiant also states that he is a certified police officer and has seized crack cocaine during a number of incidents and was being directly supervised by Group 6 Director Pete Dixon during this controlled buy.

The warrant stated that it must be executed within thirty days of the date it was issued.

The search took place on April 15, 2005. During the search of appellant's home, officers discovered approximately five grams of crack cocaine, \$1,001 in U.S. currency, a scanner, and a bank statement. Appellant was arrested and charged with possession of a controlled substance with intent to deliver. She filed a motion to suppress, which the trial court denied at the conclusion of a hearing on November 7, 2005. At the hearing, appellant moved to require the State to disclose the identity of the confidential informant, which the trial court also denied. Appellant filed this appeal, claiming that the trial court erred in denying her motion to suppress because Agent Whitworth's affidavit failed to establish probable cause to issue the warrant, the affidavit did not establish the reliability of the

confidential informant, and any probable cause that may have existed when the warrant was issued was no longer present nine days later when the warrant was executed.

When reviewing a circuit court's ruling on a motion to suppress evidence from a search, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Rule 13.1(b) of the Arkansas Rules of Criminal Procedure requires an application for a search warrant of a place to describe with particularity the place to be searched and the things to be seized and "shall be supported by one (1) or more affidavits or recorded testimony" under oath. The rule also states that, if the affidavit is based in whole or in part on hearsay, the affiant shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. "An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place." Ark. R. Crim. P. 13.1(b) (2006). Rule 13.1(b) makes it clear, however, that the failure of the affidavit to establish the veracity and bases of knowledge of the affiant's informants "shall not require that the application be denied, if the affidavit . . . viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place."

Appellant's first argument supporting her contention that the trial court erred in denying her motion to suppress is that the affidavit did not establish probable cause to believe

that drugs would be present in appellant's home. Specifically, appellant argues that the confidential informant's allegation that appellant "sells crack cocaine from her residence" merely allows one to infer that appellant is a known criminal and would therefore be expected to have drugs in her home. Appellant contends that the "known criminal averment" is not only insufficient to support a finding of reasonable cause but is entitled to no weight whatsoever. Appellant's second argument is that Officer Whitworth's affidavit contained insufficient indicia of the reliability of the confidential informant. Because appellant's first argument and second argument both concern the sufficiency and reliability of the information provided by the confidential informant, we will address these arguments together.

First, we agree that an affidavit supported only by an allegation that appellant was a known criminal and therefore would be expected to have the sought evidence in her home would have been insufficient to establish probable cause. *See Yancey v. State*, 345 Ark. 103, 112, 44 S.W.3d 315, 321 (2001) (holding that the known criminal averment is insufficient to support a finding of reasonable cause). We also agree that a search warrant is flawed if there is no indicia of reliability of the confidential informant. *Fouse v. State*, 73 Ark. App. 134, 143, 43 S.W.3d 158, 164 (2001). We disagree, however, that this affidavit was supported only by an allegation that appellant was known to have sold crack cocaine and therefore would have been expected to have crack cocaine at her home. This affidavit was also supported by the personal observations of Agent Whitworth.

Agent Whitworth stated in his affidavit that a confidential informant told him that appellant was a crack-cocaine dealer. This, standing alone, would be insufficient to support a finding of probable cause. However, Agent Whitworth also described a controlled buy from

appellant that he personally observed. He stated that, after he received the information that appellant was selling crack cocaine from her home, he asked the informant to attempt a controlled buy of crack cocaine from appellant at her residence. The informant agreed and was searched for drugs, paraphernalia, and/or money with negative results. Agent Whitworth said that he then provided the informant with forty dollars in police buy money and instructed the informant to go directly to appellant's home, attempt the buy, and return immediately to Agent Whitworth. He then watched the informant go directly to appellant's house, stay for several minutes, and return immediately to him. Agent Whitworth stated that, upon the informant's return, the informant gave him an off-white, rock-like substance, which weighed approximately four-tenths of a gram and appeared by sight and texture to be crack cocaine. The informant stated that the drugs were purchased from appellant. These personal observations by Agent Whitworth confirmed the information provided by the confidential informant. Thus, contrary to appellant's suggestion, Agent Whitworth's affidavit was not supported *only* by the confidential informant's allegation that appellant sold crack cocaine from her residence. We therefore reject appellant's first argument.

We also reject appellant's second argument that the trial court erred in failing to suppress the search warrant because Officer Whitworth's affidavit contained insufficient indicia of the reliability of the confidential informant. If the affidavit when viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure may be found in a particular location, the failure to establish the veracity of the informant is not fatal. *Id.* (citing *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993)). In *Fouse, supra*, we held that, while the affidavit in that case failed to set forth particular facts

bearing on the informants' reliability and therefore the statements of the confidential informants in the affidavit failed, alone, to establish probable cause, the officers' own observations provided confirmation of the informants' information, causing the search warrant to be supported by probable cause. *Id.* at 143, 43 S.W.3d at 164-65 (2001). *See also Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998) (holding that the officer's affidavit, viewed as a whole, provided a substantial basis for a finding of reasonable cause without resort to the informant's reliability because of the officer's personal account of the controlled buy). Here, viewing the affidavit as a whole, we conclude that it was not essential for the reliability of the confidential informant to have been established because Agent Whitworth's affidavit was not based solely on the hearsay of the informant but also on his personal observations of the controlled buy at appellant's home. We hold that the trial court's finding of probable cause to issue the search warrant was not clearly erroneous.

Finally, appellant claims that any probable cause that may have existed when the warrant was issued was no longer present nine days later when the warrant was executed. However, because appellant did not make this argument to the trial court, we will not consider it here. *See, e.g., Ilo v. State*, 350 Ark. 138, 151, 85 S.W.3d 542, 550 (2002) (holding that, where an appellant does not advance an argument to the trial court as part of the motion to suppress, we will not consider it on appeal).

For the foregoing reasons, we affirm.

GLADWIN and VAUGHT, JJ., agree.